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No.

In the

Supreme Court of the United States

EVELYN R. KRAFT,

Petitioner.

v.

WASHINGTON MUTUAL BANK, N.A.,
CAL-WESTERN RECONVEYANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1978, Congress introduced the term "annulling" into Section 362(d) of the Bankruptcy Code as a new form of relief from the statutory injunction (the "stay") imposed by Section 362(a), which prohibits post-bankruptcy petition enforcement actions against property of the bankruptcy estate. The issue of annulling the stay typically arises, as it did in this case, after a creditor has taken a post-petition enforcement action against property of the estate. The creditor then moves for an order annulling the stay to exonerate itself from the duty to undo or pay compensation for the loss caused by the enforcement action.

The Circuits all agree that the term "annulling" authorizes courts to excuse a post-petition enforcement action in appropriate circumstances. The Circuits split sharply, however, in their view of what circumstances are appropriate, posing the following three questions:

1. Whether a party resisting a motion for an order annulling the stay must show the debtor's eligibility for bankruptcy protection as a prerequisite to the applicability of the stay?

2. Whether a party moving for an order annulling an applicable stay must show one or more of inability to comply, extreme circumstances, and entitlement to prospective relief authorizing the enforcement action taken?

3. Whether an order under Section 549(c) of the Bankruptcy Code upholding a post-petition foreclosure sale to a good faith purchaser requires entry of an order annulling the stay in favor of the secured creditor that sold the property to the good faith purchaser?

PARTIES TO THE PROCEEDING

The parties to this proceedings are petitioner Evelyn R. Kraft, an individual, and respondents Washington Mutual Bank, a national association, and Cal-Western Reconveyance Corporation, a California corporation.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

EVELYN R. KRAFT,
Petitioner,

v.

WASHINGTON MUTUAL BANK and
CAL-WESTERN RECONVEYANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Evelyn R. Kraft ("Kraft") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") affirming an order entered under Section 362(d) of the Bankruptcy Code, 11 U.S.C. § 362(d).

OPINIONS BELOW

The unreported judgment of the Ninth Circuit affirmed an unreported opinion of the United States Bankruptcy Appellate Panel for the Ninth Circuit, which, in turn, affirmed an reported order of the United States Bankruptcy Court for the Central District of California. See Appendix.

JURISDICTION

The Ninth Circuit entered its judgment on May 13, 2002. It had jurisdiction based on 28 U.S.C. § 158(d). Kraft invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 362(d) of the Bankruptcy Code, 11 U.S.C. §362(d), authorizes courts to issue an order "annulling" the statutory injunction (the "stay") imposed by Section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a).

BACKGROUND

This case concerns the propriety of an order annulling the stay to exonerate respondent and secured creditor Washington Mutual Bank and respondent and foreclosure trustee Cal-Western Reconveyance Corporation (collectively, "Washington Mutual") from liability for a nonjudicial foreclosure sale of real property on September 2, 1998 during the pendency of Kraft's Chapter 7 bankruptcy case. The facts are undisputed.

Kraft fell behind in payments due under a note secured by a first deed of trust in favor of Washington Mutual. Kraft filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code on February 4, 1998 in part to save her home from foreclosure. Washington Mutual did not move for relief from stay during this bankruptcy case. Because Kraft was unable to make pre-confirmation payments, the case was dismissed on April 13, 1998. The dismissal was "without 180-day bar to refiling."

On April 15, 1998, Kraft filed a second petition under Chapter 13. Kraft gave notice of her second bankruptcy to Washington Mutual. On June 15, 1998, Kraft's Chapter 13 case was converted to one under Chapter 7. Washington Mutual had notice of the conversion of the case.

On September 2, 1998, during the pendency of Kraft's Chapter 7 case, Washington Mutual sold Kraft's home at foreclosure. When the purchaser learned of Kraft's bankruptcy, it moved for and obtained relief from stay under Sections 549(c) and 362(d). The order declared that the purchaser was a bona fide purchaser with superior title to and right to possession of the property, annulled the stay retroactively to the date of the foreclosure sale as to the purchaser, and granted prospective relief from stay to take possession of the property. On January 30, 1999, Kraft's bankruptcy case was closed.

On August 30, 1999, Kraft filed an action under Section 362(h) for damages arising from the foreclosure sale in the United States District Court for the Central District of California. Washington Mutual moved for and obtained an order requiring Kraft to reopen her bankruptcy case to obtain an abandonment of the right of action from her bankruptcy estate. Once the bankruptcy case was reopened, Washington Mutual moved for and obtained an order from the bankruptcy court annulling the stay retroactive to April 15, 1998, the date when Kraft filed her second bankruptcy petition. The bankruptcy court's stated purpose in granting the order annulling the stay was to provide Washington Mutual with a defense to Kraft's Section 362(h) action.

The bankruptcy court based its order annulling the stay on "cause" under Section 362(d)(1) and on "lack of equity" under Section 362(d)(2). 9a-11a

The "cause" under Section 362(d)(1) was "bad faith" in the form of "serial filing." The finding of "bad faith serial filing" was based on the fact that Kraft's bankruptcy case was her second case and had been filed two days after the dismissal of her first case and on the fact that Kraft's second bankruptcy case was converted to one under Chapter 7. The Ninth Circuit B.A.P. in its opinion acknowledged that Kraft was eligible under Section 109(g) to be a debtor in her second case. 6a The Ninth Circuit BAP held that, under the judicially-created good-faith-filing doctrine, bankruptcy

courts have discretion to impose stricter prohibitions on serial filing than provided for in Section 109(g). The Ninth Circuit BAP explicitly rejected Kraft's interpretation of Johnson v. Home State Bank, 501 U.S. 78, 87 (1991) as barring courts from prohibiting types of serial filing not prohibited by Congress. 12a-13a

The estate's equity in Kraft's home at the time of the filing of her bankruptcy petition was approximately $37,000, at the time immediately before the foreclosure sale the estate's equity in Kraft's home was approximately $75,000, and, after the foreclosure sale to the good faith purchaser under Section 549(c), the estate's equity in Kraft's home was zero. The bankruptcy court held that, for purposes of annulling the stay, the time after the foreclosure sale was the relevant time for measuring the equity in Kraft's home.

Kraft's action for damages under Section 362(h) is stayed in the United States District Court pending the outcome of this writ petition.

WHY REVIEW SHOULD BE GRANTED

1. The Circuits Split Over Whether Evidence Of The Debtor's Eligibility For Bankruptcy Protection Is A Prerequisite To Applicability Of The Stay

The Second, Sixth and Ninth Circuits hold that a bankruptcy petition filed by an ineligible debtor does not trigger the stay and that a subsequent order annulling the stay merely confirms this fact. In these Circuits, an order annulling the stay must issue unless the party resisting the motion shows that the debtor was eligible for protection under the judicially-created, good-faith-filing doctrine. Each of these Circuits has affirmed an order annulling the stay for "cause" under Section 362(d)(1) to excuse a secured creditor from responsibility for a post-petition foreclosure sale of real property on the ground that the party resisting the motion failed to show that the debtor was eligible under the good-faith-filing doctrine. *See Casse v. Key Bank N.A. (In re*

Casse), 198 F. 3d 327 (2nd Cir. 1999) (Chapter 13 case was void ab initio and did not trigger the stay because the debtor was ineligibile under the good-faith-filing doctrine); *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co. (In re Trident Assoc. Ltd. Partnership)*, 52 F. 3d 127 (6th Cir. 1995) (Chapter 11 case was subject to dismissal and did not trigger the stay because the debtor was ineligible under the good-faith-filing doctrine); and *Kraft v. Washington Mutual, (9a-12a) (9th Cir. BAP 2001)* (Chapter 7 case converted from Chapter 13 did not trigger the stay because the debtor failed to show "changed circumstances" between the dismissal of her first case and the filing of her second case as required for eligibility under the good-faith-filing doctrine) *aff'd without published opinion* (1a) (9th Cir. 2002). In each of *Casse*, 198 F.3d at 332, 339, 342; *Trident*, 52 F.3d at 130; and Kraft (9a-10a) at , the debtor was eligible to be a debtor under Section 109 of the Bankruptcy Code.

The First, Third and Tenth Circuits hold that the stay is automatic upon the filing of a bankruptcy petition. In these Circuits, the stay does not depend on a showing by the party resisting a motion for an order annulling the stay that the debtor was eligible for protection under the good-faith-filing doctrine. Each of these Circuits has denied a motion for an order annulling the stay to excuse a secured creditor from responsibility for a post-petition foreclosure sale of real property even where the debtor had engaged in behavior that the Second, Sixth and Ninth Circuits would characterize as "bad faith" under the good-faith-filing doctrine. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F. 3d 969, 971-72, 975 (1st Cir. 1997) (stay applicable despite debtor's filing for the sole purpose of preventing the foreclosure sale of his home and despite debtor's failure to oppose creditor's motion for relief from stay so as to alert the creditor of debtor's intent to attack a foreclosure judgment as violating the stay); *Ward. v. Bowest*, 837 F. 2d 124 (3rd. Cir. 1988) (stay applicable despite serial filing by husband and wife for purpose of recovering home sold at foreclosure in husband's prior bankruptcy); and *Pro Finance Inc. v. Spriggs (In re Spriggs)* 219 B.R. 909 (10th Cir. BAP 1998) (stay applicable

despite serial filing of three petitions in different counties for purpose of preventing foreclosure sale of home and despite debtor's failure to respond to foreclosure notices and to notify creditor of bankruptcy so as to alert creditor of intent to rely on stay), *aff'd without published opinion* (10th Cir. 1998).

Discussing the implications of the position taken by the Second, Sixth and Ninth Circuits, the Fifth and Eighth Circuits have rejected the notion that a bankruptcy petition filed by an ineligible debtor does not trigger the stay. The Fifth and Eighth Circuits note that such a rule makes eligibility an issue of subject matter jurisdiction with the potential for far-reaching, unanticipated negative consequences. *See Promenade National Bank v. Phillips (In the Matter of Phillips)*, 844 F 2d. 230, 235 n.2 (5th Cir. 1988) (disagreeing with opinions of bankruptcy courts in various circuits that held there was no subject matter jurisdiction in cases commenced by ineligible debtors) and *Rudd v. Laughlin*, 866 F. 2d 1040, 1042 (8th Cir. 1989). In the Fifth and Eighth Circuits, courts have subject matter jurisdiction over cases filed by debtors ineligible to be a debtor under Section 109 and the filing of such cases triggers the stay. *See Moran v. Frisard (In the Matter of Ulmer)*, 19 F. 3d 234, 234-35 (5th Cir. 1994) and *In re Henstra*, 75 B.R. 260 (Bankr. D. Minn. 1986) (dismissing case due to debtor's lack of eligibility under Section 109(e), but refusing to grant an order annulling the stay to validate a post-petition foreclosure sale). The Fifth Circuit has not been entirely consistent in this position. *See Rowe v. Owen Federal Bank & Trust (In re Rowe)*, 220 B.R. 591, 595 (E.D. Tex. 1997) (holding that a post-petition foreclosure sale was valid because the bankruptcy case filed by an ineligible debtor did not trigger the automatic stay), *aff'd without published opinion*, 178 F. 3d 1290 (5th Cir. 1999). The Second Circuit has adopted the *Rowe* view on the effect of the debtor's ineligibility as "established authority." *See Casse*, 198 F.3d at 342, and *FDIC v. Cortez*, 96 F. 3d 50, 51 (2nd Cir. 1996).

A debate rages over whether courts have discretion to impose good-faith-filing eligibility requirements not explicitly stated in the Bankruptcy Code. For example, the Tenth Circuit has held that courts may not bar any form of serial filing that is permitted under Section 109(g) of the Bankruptcy Code. *Frieouf v. U.S. (In re Frieouf)*, 938 F 2d 1099, 1103 n.4, 1104(10th Cir. 1991), *cert. denied* 502 U.S. 1091 (1992). The Second Circuit in *Casse* strongly disagreed, calling the Tenth Circuit's rejection of the good-faith-filing doctrine a "perverse" construction of the Bankruptcy Code. *Casse* 198 F.3d at 346.

Courts disagree over whether *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), *Toibb v. Radloff*, 501 U.S. 157 (1991), and *Home State Bank*, 501 U.S. at 87, prohibited courts from imposing good-faith-filing eligibility requirements not explicitly stated in the Bankruptcy Code. For example, the Sixth Circuit in *Trident Assoc. Ltd. Partnership* upheld the good-faith-filing doctrine, rejecting the argument of a debtor opposing a motion for an order annulling the stay that *Taylor* and *Toibb* overruled the good-faith-filing doctrine. *Trident Assoc. Ltd. Partnership*, 52 F.3d at 103-131. A bankruptcy court in the First Circuit reached the opposite view, holding that *Toibb* obviously overruled the good-faith-filing doctrine. *In re Victoria Ltd. Partnership*, 187 B.R. 54, 61 (Bankr. D. Mass. 1995). The Ninth Circuit BAP *in Kraft v. Washington Mutual* (12a-13a) rejected *Kraft's* argument that *Home State Bank* had overruled the good-faith-filing doctrine. A bankruptcy court in the Third Circuit reached the opposite view, holding that, after *Home State Bank*, there is no good-faith-filing requirement: "The problem of abusive multiple filings is addressed by 11 U.S.C § 109(g), and cases not within the precise bounds of that Code section are simply not prohibited." *In re Oglesby*, 161 B.R. 917, 924 (Bankr. E.D. Pa. 1993).

The outcome of the eligibility controversy was central to the decision in Kraft's case. The order annulling the stay to validate Washington Mutual's September 2, 1998 foreclosure sale of Kraft's home during the pendency of her Chapter 7

case turned on the fact that Kraft could not show "changed circumstances" between the dismissal of her first Chapter 13 case on April 13, 1998 and the filing of her second Chapter 13 case on April 15, 1998 and on the fact that Kraft's second case was converted to one under Chapter 7 on June 15, 1998. The Ninth Circuit took these two facts as proof of "bad faith serial filing" under the judicially-created good-faith-filing doctrine and therefore "cause" for annulling the stay under Section 362(d)(1). 9a-10a Both of these so-called "bad faith" acts are explicitly permitted by the Bankruptcy Code. Section 109(g) permits refiling where, as in Kraft's case, there is no 180-day bar to refiling entered in the prior case and no motion for relief from stay filed in the prior case. Section 1307 permits a debtor to convert a Chapter 13 case to one under Chapter 7 at any time. In the First, Third, Fifth, Eighth and Tenth Circuits, these two facts would have been irrelevant and certainly not "cause" to excuse Washington Mutual from responsibility for selling property of the estate during the pendency of Kraft's Chapter 7 case.

2. The Circuits Split Over Whether A Party Moving For An Order Annulling An Applicable Stay Must Show One Or More Of Inability To Comply, Extreme Circumstances, And Entitlement To Prospective Relief Authorizing The Enforcement Action Taken

The First and Tenth Circuits require a party moving for an order annulling an applicable stay to show inability to comply. *See Soares*, 107 F. 3d at 977 (1st Cir. 1997) (reversing order annulling the stay in favor of a creditor that had prior notice of the stay, holding that the creditor should have complied with the stay and should have applied for prospective relief) and *Franklin Savings Ass'n v. Office of Thrift Supervision*, 31 F 3d 1020, 1023 (10th Cir. 1994) (affirming denial of motion for order annulling the stay in favor of creditor that had prior notice of the stay, holding that the creditor should have complied with the stay and should have applied for prospective relief).

The Seventh, Ninth, and Eleventh Circuits do not require a party moving for an order annulling the stay to

show inability to comply. *See Matthews v. Rosene*, 739 F. 2d 249, 251 (7th Cir. 1984) (affirming order annulling the stay in favor of a creditor that had notice of the stay and could have sought prospective relief, but that, instead, litigated a counterclaim in state court to judgment and enforced the judgment without informing the state court of the stay); *National Environmental Waste Corp. v. Riverside (In re National Environmental Waste Corp.)* 129 F. 3d 1052, 1055 (9th Cir. 1997) (affirming order annulling the stay in favor of a creditor that had notice of stay and could have obeyed it, holding that, while ability to comply is a factor to weigh, it is not dispositive and debtor's failure to warn creditor of violation of stay shifted balance of equities in favor of creditor), *cert. denied* 524 U.S. 952 (1998); and *U.S. v. Ruff (In re Rush-Hampton Industries, Inc.)*, 98 F.3d 614 (11th Cir. 1996) ("we fail to see how the allowance of post-petition interest would 'reward' the IRS for the offset prior to the bankruptcy court's granting of relief from the automatic stay as the IRS would have been entitled to post-petition interest had it taken timely action to lift the stay").

The First, Seventh and Tenth Circuits require a party moving for an order annulling an applicable stay to show extreme circumstances. *Soares*, 107 F. 3d at 977 (1st Cir. 1997) (holding that a "rarely dispensed remedy like retroactive relief from the automatic stay must rest on a set of circumstances that is both unusual and unusually compelling"); *Matthews*, 739 F. 2d at 251 (7th Cir. 1984) ("Suspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems."); and *Franklin Savings Ass'n*, 31 F 3d at 1023 (10th Cir. 1994) (describing an order annulling the stay as a "rare result") and *Pro Finance, Inc.*, 219 B.R. at 912-913 (10th Cir. B.A.P. 1998) (holding that debtor's negligence in giving notice of the stay did not rise to the standard of "stealth silence" in which an order annulling the stay is justified by the debtor withholding notice of the stay for an ulterior purpose and thus causing the creditor's inability to comply

with the stay), *aff'd without published opinion* (10th Cir. 1998).

The Third, Ninth and Eleventh Circuits do not require a party moving for an order annulling an applicable stay to show extreme circumstances. *Prudential Savings Bank v. Siciliano (In re Siciliano)*, 13 F. 3d 748, 751-52 (3rd Cir. 1993) (reversing denial of order annulling stay in favor of a creditor that foreclosed without notice of the stay and remanding for a determination whether the creditor could have met the standard for prospective relief under Section 362(d)(2) with instructions to grant the order annulling the stay if the creditor could have met the Section 362(d)(2) standard; *Kraft v. Washington Mutual*, (10a) (9th Cir. BAP 2001) ("extreme circumstances" is only one of many factors to be considered in balancing the equities and not a "strict requirement") (citing *National Environmental Waste Corp.*,129 F. 3d at 1055); and *Ruff*, 98 F. 3d. at 617 (11th Cir. 1996) (holding that a "harmless violation of the automatic stay [did not] suffice to deprive the IRS of the post-petition interest setoff to which by law undoubtedly it would have been entitled had it first sought a lifting of the stay from the bankruptcy court").

The First, Third, and Eleventh Circuits require a party moving for an order annulling an applicable stay to show entitlement to prospective relief authorizing the enforcement action taken. *See Soares*, 107 F. 3d at 977 (1st Cir. 1997) (holding that entitlement to prospective relief is a necessary but not a sufficient condition); *Siciliano*, 13 F. 3d at 751-52 (3rd Cir. 1993) (holding that relief annulling the stay would be appropriate if creditor could show that it met standard for prospective relief under Section 362(d)(2)); and *Ruff*, 98 F. 3d. at 617 (11th Cir. 1996).

The Ninth Circuit does not require a party moving for an order annulling an applicable stay to show entitlement to prospective relief authorizing the enforcement action taken. *Kraft v. Washington Mutual*, (10a) (9th Cir. BAP 2001) ("entitlement to prospective relief" is only one of many

factors to be considered in balancing the equities and not a "strict requirement") (citing *National Environmental Waste Corp.*,129 F. 3d at 1055).

The Federal Circuit has a completely different approach. In *Bronson v. U.S.*, 46 F. 3d 1573, 1581-1582 (Fed. Cir. 1995), the Circuit held that post-petition tax penalties assessed by the IRS with notice of the stay were valid because the debtor had failed to move to "avoid" the assessment. *Bronson*, 46 F. 3d at 1577-78, explained that, by introducing the term "annulling" in Section 362(d), Congress had overruled *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940), which held that all acts taken in violation of the stay are void. According to *Bronson*, post-petition enforcement actions are now merely "voidable" and the burden is on the party harmed by a post-petition enforcement action to bring a motion to avoid the action. *Bronson*, 46 F. 3d at 1577-78. Bronson discusses the split among the Circuits regarding whether post-petition enforcement actions are "void" or merely "voidable" and aligned itself in the "voidable" camp with the Fifth, Sixth and Seventh Circuits and opposed the view of the "void" camp consisting of the First, Second, Third, Ninth, Tenth and Eleventh Circuits. *Bronson*, 46 F. 3d at 1577 and n. 11, 12, 13 and 14. A dissenting opinion by Circuit Judge Mayer opined that the term "annulling" did not overrule *Kalb* and that the burden remains on the creditor violating the stay to seek an order annulling the stay to validate the action taken in violation of the stay. *Bronson*, 46 F. 3d at 1582.

The First Circuit also noted the split among the Circuits regarding whether post-petition enforcement actions are "void" or merely "voidable." *Soares*, 107 F.3d at 976. The First Circuit pointed out that "this semantic difference has practical consequences because the characterization of an infringing action as 'void' or 'voidable' influences the burden of going forward." Id. Relying on *Kalb*, the First Circuit held that in order to secure the important protections of the automatic stay, courts must display a "certain rigor" in reacting to violations of the automatic stay. The First Circuit held that: "Treating an action taken in contravention of the

stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor." *Soares*, 107 F. 3d at 976.

The outcome of the burden controversy was central to the Ninth Circuit's decision in Kraft's case. Washington Mutual was able to comply with the stay, but did not. The Ninth Circuit held that this fact was a "factor," but not dispositive. Washington Mutual did not show any extreme circumstances. The Ninth Circuit held that this fact was a "factor," but not dispositive. Washington Mutual admits that Kraft's estate had equity in the property immediately before the foreclosure sale. The Ninth Circuit held that the outcome of a hypothetical motion for prospective relief under Section 362(d)(1) or Section 362(d)(2) was irrelevant to the question whether Washington Mutual was entitled to an order annulling the stay, and held, in the alternative, that Kraft's lack of equity after the foreclosure sale required retroactive relief annulling the stay. 10a-11a

3. Courts Disagree Over Whether An Order Under Section 549(c) Of The Bankruptcy Code Upholding A Post-Petition Foreclosure Sale To A Bona Fide Purchaser Requires Entry Of An Order Annulling The Stay In Favor Of The Secured Creditor That Sold The Property To The Bona Fide Purchaser

Section 549(a) of the Bankruptcy Code empowers the trustee of a bankruptcy estate to set aside a sale of real property held in violation of the stay. Section 522(h) authorizes debtors to exercise the trustee's avoiding power. Section 549(c) states an exception to the trustee's avoiding power: the trustee may not avoid a sale of real property to a "good faith purchaser" defined as one that has no knowledge of the bankruptcy case and that pays present fair equivalent value.

Courts are unsure how to reconcile the rule that post-petition foreclosure sales to good faith purchasers are unavoidable under Section 549(c) with the rule that post-petition enforcement actions are "void" or "voidable" under

Kalb and Section 362(a). Some courts view Section 549(c) as an exception to the stay that exempts the entire transaction. *E.g., Schwartz v. U.S. (In re Schwartz)*, 954 F. 2d 569, 574 (9th Cir. 1992) (characterizing Section 549(c) as an "exception to the automatic stay" in holding that post-petition tax assessment was void). Under this transactional view, neither the good faith purchaser nor the secured creditor seller violates the stay by participating in a foreclosure sale of property of the estate that is exempt under Section 549(c). See *Kraft v. Washington Mutual*, (8a, 11a, 14a) (9th Cir. BAP 2001) (suggesting as an alternative holding that the bankruptcy court's order under Section 549(c) exempting the good faith purchaser from the trustee's avoiding power and annulling the stay to the date of the foreclosure sale as to the purchaser also excused the secured creditor seller from liability for its participation in the post-petition foreclosure sale with notice of the stay).

Other courts view the trustee's avoiding power under Section 549(a) as a remedy. *E.g., Ward*, 837 F. 2d 124, 126 (3rd Cir. 1987) (describing Section 549(c) as a statutory exception to the avoidability of a sale). Under this view, the loss of the avoiding power as a remedy as to the good faith purchaser does not exempt the secured creditor seller and its agents from liability in an action for civil contempt or for statutory liability under Section 362(h). *See Administrator of Veterans Affairs v.Bernard (In re Bernard)*, 21 B.R. 287, 288 and n. 11 (Bankr. E.D. Pa 1982) (suggesting the availability of a contempt action despite unavoidability of the sale as follows: "While the sheriff's actions in issuing the deed after the debtor's filing may be punishable by contempt, if it was a knowing violation of the automatic stay provisions of the Code, that does not change the result under § 549(c)").

Foreclosure sales to buyers that may qualify as good faith purchasers under Section 549(c) appear in reported decisions and likely occur in many cases without reported decisions. For example, in the Central District of California alone, the following reported opinions involve foreclosure sales where the court discussed whether the buyer qualified

as a good faith purchaser under Section 549(c). *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478 (9th Cir. 1989), *Walker v. California Mortgage Service (In re Walker)*, 861 F.2d 597 (9th Cir. 1988), *Little v. Bago (In re Bago)*, 149 B.R. 610 (Bankr. C.D. Cal. 1993), *Little v. Duncombe (In re Duncombe)*, 143 B.R. 243 (Bankr. C.D. Cal. 1992), and *Williams v. United Investment Corp. (In re Williams)*, 124 B.R. 311 (Bankr. C.D. Cal. 1991). The loss of estate property to a bona fide purchaser is most likely to occur and the need for a remedy is greatest in those cases such as Kraft's where the estate has a large amount of equity in the property right before the post-petition foreclosure sale. It is in those cases that a buyer without notice is most likely to be the purchaser.

The outcome of the controversy over whether Section 549(c) creates a transactional exception to the stay or merely exempts a good faith purchaser from the remedy under Section 549(a) known as the trustee's avoiding power was central to the Ninth Circuit's alternative holding in Kraft's case.

WHY THE DECISION BELOW WAS WRONG

1. Evidence Of The Debtor's Eligibility For Bankruptcy Protection Is Not A Prerequisite To The Applicability Of The Stay

Congress intended the stay to be "automatic" upon filing. *See* Section 362(a). Only the continuance of the stay depends on the eligibility of the debtor and courts may lift the stay only *after* affording appropriate notice and a hearing. *See* Sections 305, 707, 1307. Eligibility is not jurisdictional. *E.g.*, *Phillips*, 844 F.2d at 235 n. 2 (5th Cir. 1988) and *Carr v. Security Sav. & Loan Ass'n*, 130 BR 434, 438 (D. N.J. 1991) ("Congress, if it wished, could have created an exception to the automatic stay where successive petitions are filed, but it did not."). Treating eligibility as jurisdictional will force creditors to make their own determination as to whether a bankruptcy filing triggered the stay and to jump the gun so as not to be left behind in the race of creditors that the filing

may or may not have stopped. Treating eligibility as jurisdictional delegates to creditors the judicial power to determine the validity of injunctions that the Constitution and Congress intended to grant only to courts. Walker v. City of Birmingham, 388 U.S. 307, 320-321 (1967) (requiring party subject to an injunction to seek review prior to violation the injunction, stating that "in the fair administration of justice, no man can be judge in his own case, however exalted his station, however righteous his motives").

Courts are not free to create eligibility requirements that prohibit types of serial filing not prohibited by Congress. *See Home State Bank*, 501 U.S. at 87.

The Ninth Circuit erred by imposing on Kraft the burden of showing "changed circumstances" between the dismissal of her first Chapter 13 case "without 180-day bar" on April 13, 1998 and the filing of her second Chapter 13 case on April 15, 1998 and the burden of explaining the conversion of her Chapter 13 case to one under Chapter 7 on June 15, 1998. The refiling was explicitly permitted by Section 109(g) and the conversion by Section 1307. The Ninth Circuit was not free to penalize Kraft and the other constituents of her bankruptcy estate for exercising rights provided by Congress.

2. A Party Moving For An Order Annulling An Applicable Stay Must Show All Of Inability To Comply, Extreme Circumstances, And Entitlement To Prospective Relief Authorizing The Enforcement Action Taken

The "well established rule that 'persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order' applies in bankruptcy cases." *Celotex Corp. v. Edwards*, 514 U.S. 300, 306 (1995) (citation omitted). Because Washington Mutual had notice of Kraft's bankruptcy case, it had a duty to seek prospective relief from stay to conduct its foreclosure sale. Instead, Washington Mutual sold property of the estate without seeking prospective relief and only earnestly sought relief from stay after Kraft sued for statutory damages under

Section 362(h). Under the general law of injunctions, "once a prima facie showing of violation has been made, the charged party has the burden of proving inability to comply." *See* 11A Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d § 2960 (1995). The standard for obtaining an order annulling the stay as a defense to a statutory contempt action should be no less onerous on the violator.

A party moving for an order annulling an applicable stay must show "extreme circumstances" because an order annulling the stay necessarily deprives the debtor and other constituents of the bankruptcy estate of property without a predeprivation hearing. *See U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'") (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)). A contrary rule would also effectively abolish Section 362(f) and Bankr. Rule 4001, which require a showing of immediate irreparable harm as a precondition to obtaining relief without affording prior notice and an opportunity to be heard to the debtor and other constituents of the bankruptcy estate.

A party moving for an order annulling an applicable stay must show entitlement to prospective relief authorizing the enforcement action taken. Otherwise, creditors have little reason not to violate the stay first and seek forgiveness under the more lenient standard for annulling the stay later.

The Ninth Circuit erred by not requiring Washington Mutual to show each of these three requirements as a precondition to the order annulling the stay entered for the express purpose of absolving Washington Mutual of responsibility to compensate Kraft and her estate for the loss caused by the foreclosure sale conducted during the pendency of her Chapter 7 case.

3. An Order Under Section 549(c) Of The Bankruptcy Code Upholding A Foreclosure Sale To A Good Faith Purchaser Did Not Require Entry Of An Order Annulling The Stay In Favor Of The Secured Creditor That Sold The Property

The purpose of the exemption from the trustee's avoiding power for good faith purchasers under Section 549(c) is to minimize the degree to which bankruptcy law interferes with state law real property recording laws and to avoid discouraging bidders from attending foreclosure sales of real property. Successful bidders that subsequently lose to trustees of unknown bankruptcy cases may be discouraged from bidding at future foreclosure sales, resulting in lower foreclosure auction prices to the general detriment of debtors, unsecured creditors, and junior secured creditors.

Nothing in Section 549(c) indicates that Congress enacted it to give the clever creditor an opportunity to launder an intentional violation of the stay in the innocence of the good faith purchaser. The better view is that Section 549(c) only curtails the remedy of the trustee's Section 549(a) avoiding power, not the alternative remedy of an action for civil contempt or for statutory damages under Section 362(h). The Ninth Circuit erred in suggesting that the innocence of the good faith purchaser of Kraft's home required entry of an order annulling the stay to absolve Washington Mutual of responsibility to compensate Kraft and her estate for the loss caused by the foreclosure sale conducted during the pendency of her Chapter 7 case.

CONCLUSION

For these reasons, Kraft respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Attorney for Petitioner

(Any footnotes trail end of each document)

No. 01-55637
CT/AG#: CC-00-01447-BMaP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

JUDGMENT

APPEAL FROM the United States Bankruptcy Appellate Panel of the Ninth Circuit.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States Bankruptcy Appellate Panel of the Ninth Circuit and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said Bankruptcy Appellate Panel in this cause be, and hereby is AFFIRMED.

Filed and entered May 13, 2002

No. 01-55637
B.A.P. No. CC 00-1447 BMaP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

Filed May 13, 2002

MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Brandt, Marlar, and Perris, Bankruptcy Judges, Presiding

Submitted March 14, 200**
Pasadena, California

Before: KOZINSKI and GOULD, Circuit Judges, and CEBULL,*** District Judge.

After careful consideration of the record and briefs, we affirm the decision of the Bankruptcy Appellate Panel filed March 15, 2001, for the reasons given by the Bankruptcy Appellate Panel in its memorandum decision.

AFFIRMED.

Footnotes

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Richard F. Cebull, United States District Judge for the District of Montana, sitting by designation.

BAP NO. CC-00-1447-BMaP
BK NO. LA 98-24815 EC

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: EVELYN R. KRAFT
Debtor

EVELYN R. KRAFT,
Appellant

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

Filed March 15, 2001

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the Central District of California

THIS CAUSE came on to be heard on the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is AFFIRMED.

FOR THE PANEL,
Nancy B. Dickerson,
BAP Clerk

By: Edwina Clay Deputy Clerk

BAP NO. CC-00-1447-BMaP
BK NO. LA 98-24815 EC

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re: EVELYN R. KRAFT,
Debtor

EVELYN R. KRAFT,
Appellant,

v.

CAL-WESTERN RECONVEYANCE CORPORATION;
WASHINGTON MUTUAL BANK, N.A.,
Appellees.

MEMORANDUM fn1

Argued and Submitted on February 22, 2001
at Pasadena, California

Filed March 15, 2001

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR, and FERRIS, Bankruptcy Judges

Debtor Evelyn R. Kraft ("Kraft") appeals the bankruptcy court's order granting retroactive annulment of the automatic stay to Cal-Western Reconveyance Corporation ("CWR") and Washington Mutual Bank, N.A. ("WMB"). We AFFIRM.

I. FACTS

Kraft filed a chapter 13 fn2 petition on 4 February 1998, the day before a scheduled non-judicial foreclosure sale of her residence at 3604 West Estates Lane, Unit 315, Palos Verdes, California. Her plan called for monthly payments of $452.32; she made only one $50 payment on 13 April 1998 the case was dismissed, without prejudice, for failure to make plan payments. Kraft filed a second chapter 13 petition two days later, one week prior to a continued foreclosure sale. The schedules filed in the second case were identical to those in the first. She made no plan payments in this second case, nor did she appear at the § 341 meeting. On 15 June 1998, after the chapter 13 trustee had submitted a proposed order for dismissal with a 180-day bar to refiling, Kraft converted her case to chapter 7.

On 2 September 1998, without obtaining relief from the automatic stay, CWR conducted a foreclosure sale of Kraft's residence on behalf of WMB. CWR and WMB were both aware of debtor's bankruptcy filing but, according to CWR, one of its employees had misread the PACER (Public Access to Court Electronic Records) report items "Order discharging chapter 13 panel trustee and exonerate bond liability" and "Final, report of trustee in asset case" as meaning the discharge had been entered. WR conducted the sale believing the stay was no longer in effect. Diversified Properties, Inc. ("Diversified") purchased the property *at* the foreclosure sale for $98,500.

Upon realizing it had conducted the sale in violation of the stay, CWR recorded a rescission of the trustee's deed. When Diversified learned of Kraft's pending bankruptcy case, it sought annulment of the automatic stay retroactive to the sale date. WMB concurrently brought a motion to invalidate the sale. The bankruptcy court granted Diversified's motion and denied WMB's, entering written orders on 31 December 1999 (the first order is in the excerpts of record provided to us; the second was not included). Kraft did not appeal either order. CWR rescinded its previously-recorded Rescission of

the Trustee's Deed Upon Sale.

Kraft received her discharge on 19 October 1998, and her case closed on 29 January 1999. Seven months later she filed an action for damages in the United States District Court for the Central District of California, alleging a claim against WMB and CWR under § 362(h) for willful violation of the automatic stay. CWR moved to dismiss the action, arguing that Kraft lacked standing. The district court stayed the action while Kraft reopened her case and obtained an order of abandonment.

On 27 June 2000 WMB and CWR moved for annulment of the stay, retroactive to the date of filing. The bankruptcy court granted the motion over Kraft's objection, entering an order on 26 July 2000. This appeal ensued.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and 157(b) (1), and we do under 28 U.S.C. § 158(c).

III. ISSUE

A. Whether this appeal is moot.

B. Whether the bankruptcy court abused its discretion in granting appellee's motion for retroactive annulment of the stay.

IV. STANDARD OF REVIEW

We review a decision to annul the automatic stay retroactively for abuse of discretion. Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.), 129 F.3d 1052, 1054 (9th Cit. 1997). A finding of bad faith is a factual determination reviewed for clear error. Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 938 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th Cir. 1999).

V. DISCUSSION

A. Mootness

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case[s] before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971) (citation omitted) . An issue is moot when the court cannot fashion a remedy for the wrong. Gun v. Boni (In re Boni), 240 B.R. 381, 384-85 (9th Cir. BAP 1999) (citing In re Spirtos, 992 F.2d 1004, 1006 (9th Cir. 1993)

When CWR and WMB sought relief, the stay had already been annulled to validate the sale to Diversified, raising a question as to whether retroactive annulment was even necessary for CWR and WMB. If not, we would be unable to fashion effective relief, as none would be necessary, and this appeal would be moot. Accordingly, we ordered briefing on whether there could be a willful violation of stay, previously annulled on motion of another party. Both parties responded.

Kraft contends, without citation to authority, that relief from stay is effective only as to the moving party. CWR and WMB cite no pertinent authority either, and we have not located any.

Kraft points out that the bankruptcy court granted relief to Diversified exclusively because of its status as a bona fide purchaser under § 549(c), Tr., 19 April 2000, p. 10. In addition, the judge noted during the hearing on Diversified's motion that if she did annul the stay, it would be as to Diversified only, and not for WMB. Tr., 17 November 2000, p. 6. Kraft argues that the appeal is not moot, because reversal will "restore" her claim for damages under § 362(h). Further, the (form) order annulled the stay retroactively under § 362(d) (1) and (d) (2) "[a]s to Movant, its successors, transferees and assigns." The court's oral remarks support this conclusion.

Assuming (without deciding) the order was effective only as to Diversified, appellees could still theoretically be liable for

a willful violation of the stay absent affirmance of the order on appeal. Counsel for CWR and WMB readily admits the sole purpose for seeking retroactive annulment was defense of the district court action. The relief Kraft would gain from reversal is that her action may go forward.

As will be seen, we need not (and do not) resolve the question of whether the stay is unitary, but Kraft's rights are affected, and we will not dismiss the appeal as moot.

B. Retroactive Annulment of the Stay

A petition in bankruptcy operates as a stay against acts affecting property of the bankruptcy estate. 362(a). Actions taken in violation of the automatic stay are void, Nat'l Envtl Waste, 129 F.3d at 1054 (citing In re Schwartz, 954 F.2d 569, 571-72 (9th Cir. 1992)), but bankruptcy courts have wide latitude in fashioning relief from the automatic, stay, and power to annul it retroactively, validating acts otherwise violating the stay. Boni, 240 B.R. at 384. Whether retroactive annulment is warranted is determined on a case-by-case basis, Nat'l Envtl. Waste, 129 F.3d at 1055, (calling for balancing of the equities).

Lack of good faith in filing a chapter 13 plan may be "cause" to annul the stay retroactively. See Blatnick v. Sanders (In re Sanders), 198 B.R. 326, 329 (Bankr. S.D. Cal. 1996) and In re Powers, 135 B.R. 980, 998 (Bankr. C.D. Cal. 1991). Successive chapter 13 filings do not constitute bad faith per se, but "successive filings may be examined together and the result achieved by such filings reviewed against the statutory requirements." Downey Sav. & Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987). A bona fide change in circumstances may justify a successive filing. See id. at 1498.

The bankruptcy judge granted the motion to retroactively annul the stay, finding that, had relief been sought at the time of the foreclosure sale, she would have granted it "in a flash." Tr., 25 July 2000, p. 7. The court found that Kraft's filing of a

second chapter 13 petition absent changed circumstances, and her later conversion to chapter 7 to avoid the trustee's motion to dismiss, was bad faith conduct warranting retroactive annulment. The court further found that the stay violation did not appear to have been willful, noting WMB had attempted to rescind the sale.

Kraft neither argued nor cited evidence that her second chapter 13 plan was filed in good faith. Indeed, she is precluded from making such an argument: the order annulling the stay as to Diversified included extraordinary relief (180-day transfer injunction and provision that order be effective in any bankruptcy case filed by or against debtor's successor's transferees, or assignees for 180 days) and was "[b]ased upon evidence of efforts by Debtor(s) or others acting in concert with Debtor(s) to delay, hinder, or defraud Movant by abusive bankruptcy filings[.]." That order was not appealed.

Kraft instead argues that a creditor seeking retroactive relief from stay must show three elements, not proven here: (1) entitlement to the relief taken had the creditor applied for relief prospectively; (2) the creditor's inability to comply with the stay; and (3) "extreme circumstances" shifting the balance of equities in favor of the creditor, citing Matava v. Kissinger (In re Kissinger), 72 E.3d 107 (9th Cir. 1995); Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670 (11th Cir. 1984); Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969 (1st Cir. 1997); and Blatnick v. Sanders (In re Sanders), 198 B.R. 326 (Bankr. S.D. Cal. 1996). None of these cases sets forth specific "elements" that must be proven to warrant retroactive relief. In the Ninth Circuit, these elements are factors to be considered, not strict requirements: courts are to determine each case on its own facts. See Nat'l. Envtl. Waste, 129 F.3d at 1055.

Respecting the first factor, Kraft argues that prospective relief would not have been warranted, because the evidence showed she had between $36,634.55 and $75,000 of equity in her real property. However, the bankruptcy judge indicated

she would have granted relief "in a flash" had it been requested earlier. Lack of good faith, not adequate protection, was the "cause" upon which the bankruptcy court relied; equity in the property is relevant only to the extent it may be a factor to consider in balancing the equities. Further, the order granting relief to Diversified was predicated, in part, on § 362(b) (1) the debtor's lack of equity.

On the second point, Kraft reads Kissinger and Albany Partners as imposing a requirement that, where a stay violation is willful, the creditor must show an inability to comply with the stay before retroactive relief is warranted. In Kissinger, the stay violation occurred when a state court judge sent the creditor's case to the jury. The Ninth Circuit upheld retroactive annulment in part because the "failure to obey the stay was caused by the state court judge, not the creditor." 72 F.3d at 109. In Albany Partners, the Eleventh Circuit upheld retroactive annulment validating a foreclosure sale where the creditor, although notified of the bankruptcy filing, proceeded with foreclosure in reliance on a prior judicial determination that the subject property did not belong to the debtor.

Kissinger and Albany Partners merely demonstrate the balancing courts do in determining whether retroactive annulment is appropriate. Those cases do not impose a bright line rule that the creditor must show inability to comply with the stay.

Finally, Kraft argues that appellees failed to show extreme circumstances shifting the equities in their favor. She contends that any harm to CWR or WMB was a consequence of their own wrong in violating the stay. As part of this argument, she claims the bankruptcy court erroneously placed on Kraft and the Chapter 7 trustee the burden of showing the estate was entitled to the benefit of the stay as a precondition to recovering for loss of property of the estate. Her citation to the record does not shed any light on what this argument means, but if it means she disputes that she had the burden of coming forth with evidence to refute

CWR's and WMB's allegations of bad faith, she is mistaken. The debtor has the burden of showing good faith when that issue is raised as "cause" for granting relief from stay. § 362(g); United Enters., Ltd. v. ACI Sunbow LLC (In re ACI Sunbow, LLC), 206 B.R. 213, 217 (Bankr. S.D. Cal. 1997).

Kraft next argues that, to obtain relief from stay based on bad faith serial filings, a creditor must prove that the debtor filed her petition in violation of § 109(g), which prohibits refiling for 180 days after dismissal either (1) for willful failure to abide by a court order; or (2) after voluntary dismissal following filing of a request for relief from stay. In support of this argument Kraft cites In re Oglesby, 161 B.R. 917, 924 (Bankr. E.D. Pa. 1993); Matter of Marlatt, 116 B.R. 703, 707 (Bankr. 0. Neb. 1990); In re Samuel, 77 B.R. 520, 521 (Bankr. E.D. Pa. 1987); In re Surace, 52 B.R. 868, 871 Bankr. C.D. cat. 1985); and Johnson v. Home State Bank, 501 U.S. 78, 87 (1991). None of these cases involves a motion for retroactive annulment, or even stay relief, and we find no Ninth Circuit authority requiring such proof. If anything, the cited cases cut against Kraft's position.

Kraft quotes from Johnson:

Congress has expressly prohibited various forms of serial filings. See, e.g., 11 U.S.C. § 109(g) (no filings within 180 days of dismissal) § 727(a) (8) (no Chapter 7 filing within six years of a Chapter 7 or Chapter 11 filing); § 727(a) (9) (limitation on Chapter 7 filing within six years of Chapter 12 or Chapter 13 filing) . The absence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of Chapter 13 reorganization to a debtor who previously has filed for Chapter 7 relief. Cf. United States v. Smith, 499 U.S. 160, 167, 111 S. ct. 1180, 1185, 113 L. Ed. 2d 134 (1991) (expressly enumerated exceptions presumed to be exclusive)

501 U.S. at 87. She admits that language is dicta; it merely notes that Congress expressly prohibited certain types of serial filings in § 109(g) but did not prohibit serial filings of chapter 7 and chapter 13 petitions.

Next, Kraft argues that § 362(h) limits the bankruptcy court's discretion to annul the stay retroactively. Again, she cites no authority directly supporting this argument, but reasons that, because damages under § 362(h) are mandatory upon a finding of a willful stay violation, citing Ramirez v. Fuselier (In re Ramirez), 183 E.R. 563, 567 (9th Cir. BAP 1995), the bankruptcy court had no discretion to nullify damages by granting retroactive annulment of the stay. In Ramirez, we held that a finding of willfulness is warranted if the creditor knew of the automatic stay, even if the creditor believed in good faith that it had a right to the property at issue. "Not even a good faith mistake of law or a legitimate dispute as to legal rights relieve a willful violator of the consequences of his act." id. at 589 (citation and internal quotations omitted).

While Ramirez remains good law on damages under § 362(h), it is inapplicable here. In determining whether retroactive annulment of the stay is warranted, the bankruptcy court must look to the totality of the circumstances. Nat'l Envtl Waste, 129 F.3d at 1055. The creditor's conduct (as well as the debtor's) is certainly a factor to be considered. id. Here, the bankruptcy court noted that CWR's and WMB's stay violation did not appear to willful, in that their actions were predicated on mistake, and they immediately attempted to rescind the sale once they learned of that mistake. While that might be insufficient to shield them from liability for damages in a § 362(h) action, it is relevant in determining whether retroactive relict is appropriate.

In her reply brief, Kraft argues that National Environmental Waste is inapplicable here because the debtor in that case was a corporation, and corporations are not entitled to damages for willful stay violations under § 362(h). However, Johnston Environmental Corp. v. Knight (In re Goodman), 991 F.2d 613, 620 (9th Cir. 1993) holds that while only

individuals may recover damages under § 362(h), an injured corporation may still recover damages for civil contempt. Kraft cites no authority for distinguishing between a corporate and individual debtor in determining whether retroactive relief is warranted, and we see no meaningful distinction.

Finally, Kraft argues that CWR and WMB should be barred by laches from obtaining relief from stay. She complains they waited almost two years before seeking retroactive relief, and only after Kraft had expended time and funds to bring the district court action. CWR and WMB point out that because the bankruptcy court had validated the sale as to Diversified, they did not believe they needed to seek relief, and they note that Kraft who did not appeal the bankruptcy court's order annulling the stay as to Diversified, waited nearly a year after the foreclosure sale before filing her suit for damages in district court.

In these circumstances, the bankruptcy court did not abuse its discretion in granting retroactive annulment of the stay, even taking into account CWR and WMB's delay in seeking it.

VI. CONCLUSION

This appeal is not moot.

The bankruptcy court did not abuse its discretion in granting retroactive annulment of the automatic stay; had faith in filing a chapter 13 plan, coupled with the prior annulment respecting the same sale on the purchaser's motion, suffice for relief, and Kraft has not shown that finding clearly erroneous.; We AFFIRM.

Footnotes

fn1 This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. 9th Cir. BAP Rule 8013-1.

fn2 Absent contrary indication, all section and chapter references are to the Bankruptcy Code, it U.S.C. §§ 101-1330.

Attorney or Party Name, Address, Telephone & FAX Numbers and California State Bar Number

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: EVELYN R. KRAFT aka EVELYN R. MCCLIMON, Debtor and PETER C. ANDERSON, Trustee.

CHAPTER: 7

CASE NO.: LA 98-24815-EC

DATE: JULY 25, 2000
TIME: 3:00 P.M.
CTRM: 1639

ORDER GRANTING MOTION FOR RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362 (Real Property) (MOVANTS: CAL-WESTERN RECONVEVANCE CORPORATION and WASHINGTON MUTUAL BANK. N.A.)

1. The Stay Motion was: X Contested

2. The Stay Motion affects the following real property (the "Property"):
Street Address: 3504 West Estates Lane (fka 26002 Crenshaw) (aka Estates Lane)
Apartment/Suite no: Unit #315 (aka 315C)
City. State, Zip Code: Palos Verdes, California 90274

Legal description or document recording number (including county of recording):
X See attached page.

3. The Motion is granted under: X 11 U.S.C. § 362(d)(1) X 11 U.S.C. § 362(d)(2)

4. As to Movant, its successors, transferees and assigns ("Movant"). the stay of 11 U.S.C. § 302(a) is;
a. X Terminated as to Debtor and Debtor's bankruptcy estate.
b. X Annulled retroactively to the date of the bankruptcy petition filing on April 15, 1998.

T-5.# 1003615-02 EXHIBIT "A"

THE LAND REFERRED TO IN THIS GUARANTEE IS SITUATED IN THE UNINCORPORATED AREA). COUNTY OF LOS ANGELES, STATE OF CAUFORNIA. AND IS DESCRIBED AS FOLLOWS:

A CONDOMINIUM COMPRISED OF:

PARCEL 1: AN UNDIVIDED .4138% INTEREST IN AND TO:

LOT 1 OF TRAC TNO. 32133, AS PER MAP FILED IN BOOK 854, PAGES 68 TO 72. INCLUSIVE, OF MAPS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM UNITS 1 THROUGH 300, INCLUSIVE, AS SHOWN UPON THE CONDOMINIUM PLAN RECORDED FEBRUARY 16, 1979, AS INSTRUMENT NO. 79-196290, OFFICIAL RECORDS.

PARCEL 2:

UNIT 54, AS SHOWN UPON THE CONDOMINIUM PLAN REFERRED TO IN PARCEL 1 ABOVE.
Commonly known as: 3604 W. Estates Lane, 3315, Palos Verdes, CA

Attorney or Party Name, Address, Telephone & FAX Numbers, and California State Bar Number

MICHAEL R. SMENT, ESQ. SBN090949
LAW OFFICES OF MICHAEL R. SMENT
674 County Square Drive, Suite 108
Ventura, CA 93003
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X Attorney for: Movant DIVERSIFIED PROPERTIES

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: EVELYN R. KRAFT
aka EVELYN R. MCCLIMON

CHAPTER: 7

CASE NO.: LA 98-24815-EC

DATE: December 22, 1998
TIME: 3:30 P.M.
CTRM: 1639
FLOOR: 16th

ORDER GRANTING MOTION FOR RELIEF
FROM THE AUTOMATIC STAY
UNDER 11 U.S.C. § 362 (Real Property)
(MOVANT: DIVERSIFIED PROPERTIES)

1. The Stay Motion was: XX Contested

2. The Stay Motion affects the following real property (The 'Property'):
Street Address: 3604 W. Estates Lane (aka Estates Lane) (fka 26002 Crenshaw
Apartment/Suite no.: Unit #315 (aka 315C)
City, State, Zip Code: Pales Verdes, California 90274

Legal description or document recording number (including county of recording):

X See attached page.

3. The Motion is granted under: X 11 U.S.C. § 362(d)(1) X 11 U.S.C. § 362(d)(2)

4. As to Movant, its successors, transferees and assigns ("Movant"), Vote stay of 11 U.S.C. § 3S2(a) is:

b. XX Annulled retroactively to the date of the trustee's sale (9/2/98) as to Debtor and Debtor's bankruptcy estate.

THE LAND REFERRED TO IN THIS GUARANTEE IS SITUATED IN THE (UNINCORPORATED AREA).

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, AND IS DESCRIBED AS FOLLOWS:

A CONDOMINIUM COMPRISED OF:

PARCEL 1: AN UNDIVIDED .4138% INTEREST IN AND TO:

LOT 1 OF TRAC TNO. 32133, AS PER MAP FILED IN BOOK B54, PAGES 5B TO 72, INCLUSIVE, OF MAPS. IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

EXCEPTING THEREFROM UNITS 1 THROUGH 300, INCLUSIVE. AS SHOWN UPON THE CONDOMINIUM PLAN RECOPOED FEBRUARY IC, 1979, AS INSTRUMENT NC. 79-196290, OFFICIAL RECOPDS.

PARCEL 2:

UNIT 54 AS SHOWN UPON THE CONDOMINIUM PLAN REFERRED TO IN PARCEL 1 ABOVE.

Commonly known as: 3604 W. Estates Lane, 3315, Palos Verdes, CA

5. X Movant may enforce its remedies to foreclose upon and obtain possession of the Property In accordance with applicable nonbankruptcy law, but may not pursue any deficiency claim against the Debtor(s) or property of the estate except by filing a Proof of Claim pursuant to 11 U.S.C. 501.

7. X Any post-petition acts taken after the effective date of this Order by Movant to enforce its remedies in accordance with applicable non-bankruptcy law against the Debtor(s) or properly of the estate shall not constitute a violation of the stay in this bankruptcy case.

10. This Court further orders as follows:

a. XX This Order shall be binding and effective in any bankruptcy case commenced by or against the Debtor(s) for a period of 180 days from the hearing of this Motion.

c. XX See Extraordinary Relief Attachment (Use Optional Form 351 ER) for additional provisions.

Dated: 12/30/02

United States Bankruptcy Judge

EXTRAORDINARY RELIEF ATTACHMENT
(MOVANT: DIVERSIFIED PROPERTIES)
(This Attachment Is the continuation page for paragraph 10 of the fore going Order)

Based upon evidence of efforts by Debtor(s) or others acting in concert with Debtor(s) to delay, hinder or defraud Mcvant by abusive bankruptcy filings, this Court further orders as follows:

1. X This Order Is binding and effective in any bankruptcy case commenced by or against any successors,

transferees, or assignees of the above-named Debtor(s) for a period of 180 days from the hearing of this Stay Motion

X without further notice.

5. X The Debtor(s) is/are hereby enjoined from transferring all or any portion of the Property for a period of 180 days from the hearing of this Stay Motion except as may be authorized by further order of this Court, and any transfer in violation of this Order

Judge's Initials

STATUTES INVOLVED

Section 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided

under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(2)

SUPREME COURT, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-399

In The

Supreme Court of the United States

EVELYN R. KRAFT,

Petitioner,

v.

WASHINGTON MUTUAL BANK, N.A.,
CAL-WESTERN RECONVEYANCE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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10 PP

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Cal-Western Reconveyance Corporation is a privately held corporation. No publicly held company owns 10% or more of the corporation's stock.

Respondent Washington Mutual Bank is a subsidiary of Washington Mutual Bank, Inc. No publicly held company owns 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

This appeal arises out a decision of the United States Ninth Circuit Court of Appeals, which affirmed an order of the United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals, which affirmed an order of the United States Bankruptcy Court for the Central District of California. By an order dated July 26, 2000, the Bankruptcy Court retroactively annulled the automatic stay as to Cal-Western Reconveyance Corporation ("Cal-Western") and Washington Mutual Bank, N.A. ("Washington Mutual") in the second of two chapter 13 bankruptcy cases filed by the Debtor between February and April of 1998.

The Petitioner first filed a voluntary chapter 13 bankruptcy petition on February 4, 1998 (the "first bankruptcy case"). This filing occurred one day prior to the scheduled foreclosure sale on the Petitioner's residence located at 3604 W. Estates Lane, Unit 315, Palos Verdes, California 90274.

The first bankruptcy case was dismissed on April 13, 1998, based upon the Petitioner's failure to make pre-confirmation plan payments to the Chapter 13 Trustee. Two days after the dismissal of the first bankruptcy case, the Petitioner filed a second Chapter 13 petition (the "second bankruptcy case"). The Petitioner again failed to make any pre-confirmation plan payments to the Chapter 13 Trustee, failed to make any post-petition mortgage payments, and failed to appear at the initial meeting of creditors set for Friday, June 12, 1998.

As a result, the Chapter 13 Trustee submitted an order to dismiss the second bankruptcy case with a 180 day bar to re-filing another bankruptcy case. On Monday,

June 15, 1998, just one business day later, the Petitioner filed a conversion of the second bankruptcy case to a Chapter 7, thus evading a 180 day bar to further bankruptcy relief.

On September 2, 1998, based on a P.A.C.E.R. Report which read "Order Discharging Chapter 13 panel Trustee and Exonerating Bond Liability" and "Final Report of Trustee in Asset Case", Cal-Western mistakenly believed that the Petitioner was discharged and that the automatic stay terminated by operation of law. As a result, in its capacity as foreclosure trustee for Washington Mutual, Cal-Western proceeded with the foreclosure sale that had been continued to that date during the pendency of the second bankruptcy case. A third party known as Diversified Properties purchased the subject property at the sale. Upon learning that it held the Trustee's sale in violation of the automatic stay, Cal-Western recorded a Rescission of the already recorded Trustee's Deed Upon Sale.

On November 17, 1998, Diversified Properties brought a Motion to Annul the Automatic Stay in the Bankruptcy Court. Diversified Properties requested that the Court annul the stay retroactively to validate the foreclosure sale. Concurrently, Washington Mutual brought a motion to invalidate the sale. On December 31, 1998, the Court granted Diversified Properties' Motion and annulled the Automatic Stay retroactive to September 2, 1998, the date of the Trustee's sale. The Bankruptcy Court also denied Washington Mutual's motion to invalidate the sale. On March 1, 1999, Cal-Western rescinded the previously recorded Rescission of the Trustee's Deed Upon Sale.

The Petitioner's second bankruptcy case closed on January 29, 1999. On August 31, 1999, the Debtor filed a

complaint against Cal-Western and Washington Mutual in the United States District Court for the Central District of California, claiming damages for an alleged willful violation of the automatic stay. On January 7, 2000, Cal-Western brought a Motion to Dismiss the Amended Complaint on the grounds that the Debtor did not have standing to pursue the alleged claims. On March 1, 2000, the United States District Court granted Cal-Western's Motion to Dismiss, staying the dismissal for 60 days to permit Debtor to pursue relief in the Bankruptcy Court. The Bankruptcy Court re-opened the second bankruptcy case on the Petitioner's motion by an order dated May 11, 2000. Cal-Western and Washington Mutual then filed a motion to annul the stay retroactive to April 15, 1998, the filing date of the second bankruptcy case. The Bankruptcy Court granted the motion over the Debtor's opposition by an order dated July 26, 2000.

The Debtor appealed the Bankruptcy Court's Order to the United States Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals. By an unpublished memorandum decision dated March 15, 2001, the Bankruptcy Appellate Panel affirmed the decision of the Bankruptcy Court. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the Bankruptcy Appellate Panel by an unpublished decision dated May 13, 2002.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for Writ of Certiorari for three reasons. First, neither the decisions below nor the record raise the first or third questions presented in the petition. Regarding the first question presented, the

courts below did not require the petitioner to establish eligibility for bankruptcy protection as a prerequisite to the applicability of the automatic stay. Instead, the courts below recognized that a stay arose by operation of law pursuant to 11 U.S.C. § 362 upon the filing of a bankruptcy petition, but applied the Bankruptcy Code and decisional authority to determine that cause existed to annul the automatic stay retroactively under the specific facts of the case. Regarding the second question presented, none of the courts below ruled on the applicability of 11 U.S.C. § 549, subd. (c) to the present case, meaning it cannot serve as a basis for granting certiorari.

Second, no split of authority exists among the Circuits concerning the circumstances under which a bankruptcy court may annul the automatic stay under 11 U.S.C. § 362(d). The Petitioner would have this Court set rigid criteria for courts to apply in evaluating whether to annul the automatic stay. However, no Circuit has set such rigid criteria, and the Ninth Circuit, the First Circuit, and lower courts in other Circuits have correctly recognized that courts should analyze the specific facts of each case and determine the propriety of annulment based upon the consideration of multiple factors. *See National Environmental Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052, 1054 (9th Cir.1997); *In re Soares*, 107 F.3d 969, 977 (1st Cir.1997).

Third, the Bankruptcy Court correctly annulled the automatic stay after considering the specific circumstances of the case in light of the factors specified in *Nat'l Envtl.* The Bankruptcy Court recognized that the utter absence of changed financial circumstances between the Petitioner's bankruptcy filings justified annulment in this

case, and the reviewing courts did not abuse their discretion in affirming that decision.

A. The Decision Below does not Present the Questions of the Petitioner's Eligibility for Protection of the Automatic Stay

The Petitioner attempts to create an issue for review by characterizing the decisions below as requiring the Petitioner to establish her eligibility for bankruptcy protection as a prerequisite to the applicability of the automatic stay. However, neither the facts of the case below nor bankruptcy law present this question.

The automatic stay arises by operation of law upon the filing of a bankruptcy petition. 11 U.S.C. § 362(a); *Nat'l Envtl.*, *supra*, 129 F.3d at 1054; *Soares*, *supra*, 107 F.3d at 975. Nevertheless, Bankruptcy Code section 362(d)(1) gives courts discretion to "terminate, *annul*, modify, or place conditions upon the automatic stay." (Emphasis added.) The power to annul the stay includes the power of courts to grant retroactive relief from the automatic stay. *Nat'l Envtl.*, *supra*, 129 F.3d at 1054; *Soares*, *supra*, 107 F.3d at 977.

The automatic stay arose in the case below when the Petitioner filed her second bankruptcy case on April 15, 1998. The Bankruptcy Court annulled the stay only after a noticed motion by Cal-Western and Washington Mutual specifically requesting annulment of the stay retroactive to the date of filing. Consequently, the case below involved the undisputed authority of the Bankruptcy Court to annul the automatic stay after consideration of all of the surrounding circumstances.

Further, the cases cited by Petitioner for the proposition that some Circuits require evidence of a debtor's eligibility for bankruptcy protection as a pre-condition to operation of the automatic stay do not stand for that principle. In *Trident Associates Limited Partnership v. Metropolitan Life Insurance Company (In re Trident Associates Limited Partnership)*, 52 F.3d 127 (6th Cir.1995), the Court granted a motion to lift the automatic stay filed one and one-half weeks *after* the filing of the petition and the undisputed operation of the stay. The *Trident* court granted relief for cause based upon the debtor's lack of good faith in filing the case, but did not condition the operation of the stay upon a showing of eligibility. *Id.* at 130-31.

The Second Circuit Court of Appeals decision in *Casse v. Key Bank N.A. (In re Casse)*, 198 F.3d 327 (2nd Cir.1999) involved the effect of an order entered in a prior bankruptcy case prohibiting the same debtor from filing a new bankruptcy petition. The case below does not present this issue because it involved a motion to annul the stay retroactively by Cal-Western and Washington Mutual after the stay already arose, and not a pre-existing order prohibiting the Petitioner from seeking relief under the Bankruptcy Code.

Since the automatic stay arose by operation of law when Petitioner filed her second bankruptcy case, and because the Petition fails to reveal a dispute among the Circuits that the stay arises automatically upon the filing of a petition, the Court should deny the petition for review.

B. The Decision below Does Not Present Any Question Regarding 11 U.S.C. § 549

The third question presented in the petition purports to raise an issue concerning the scope of an order under 11 U.S.C. § 549, subd. (c). However, the order of the United States Bankruptcy Court for the Central District of California from which Petitioner originally appealed contains no reference to that section. The decision of the United States Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals refers to the section once, but only in the context of finding the Petitioner's appeal was not moot. The Ninth Circuit Court of Appeals decision does not mention section 549. Consequently, Petitioner's characterization of a single reference to section 549 by the Bankruptcy Appellate Panel as an "alternative holding" grossly misrepresents the record and cannot form the basis for a grant of certiorari in this case.

C. No Split of Authority over the Factors Governing Annulment of the Stay Exists

The Petitioner would have this Court create a test requiring creditors seeking annulment of the stay to show "one or more" of the inability to comply with the stay, extreme circumstances, or entitlement to prospective relief. (Petition at p. i.) However, a uniform test for courts to apply in determining whether to annul the stay already exists. Further, no Circuit decision supports the Petitioner's proposed test, which would limit the uniformly recognized discretion vested in the bankruptcy courts to determine the propriety of annulling the automatic stay in a particular case.

Bankruptcy Code section 362(d), subdivisions (1)-(3), already specifies the only bases on which courts can issue an order annulling the automatic stay. Subdivision (d)(1) provides that courts may annul the stay based upon a showing of "cause". The Circuits have uniformly recognized that although the Bankruptcy Code does not define the term cause, the determination of whether cause exists requires an analysis of multiple factors and the specific circumstances of each case. *See Nat'l Envtl., supra,* 129 F.3d at 1055 (court engages in case-by-case analysis and balances the equities in order to determine whether retroactive annulment is justified); *Soares, supra,* 107 F.3d at 977 ("[w]e do not suggest we can write a standard that lends itself to mechanical application. Each case is sui generis and must be judged accordingly."); *Albany Partners, Ltd. v. W.P. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675-76. The principle of providing discretion to the bankruptcy courts to determine whether cause exists under the specific facts of each case underlies each of these decisions, and represents a sound and equitable test for courts to apply.

The factors identified by Petitioner in her proposed test either lack legal support or represent matters on which the Circuits already agree. For example, Petitioner cites *Soares* as supporting the position that courts should only grant retroactive relief when the creditor has the inability to comply with the automatic stay. However, *Soares* explicitly permits annulment of the automatic stay solely upon a showing of the debtor's bad faith, and regardless of notice of the stay. *See Soares* at 977. In addition, all of the Circuits – including the Ninth – acknowledge that annulment of the automatic stay represents a form of relief available in limited circumstances. *See Matava v. Kissinger (In re Kissinger)*, 72 F.3d 107 (9th

Cir.1995). Thus, the claim that some Circuits do not require a showing of "extreme" circumstances represents an attempt to create a dispute among Circuits where none exists.

Finally, Petitioner's contention that the Ninth Circuit does not require a moving party to show an entitlement to prospective relief as a condition to obtaining an order annulling the stay grossly misstates the law. A moving party may only obtain an order granting relief or annulment of the stay if it satisfies one of the conditions specified in Bankruptcy Code section 362(d). A creditor could not obtain retroactive relief from the automatic stay if it could not also establish an entitlement to prospective relief from stay. As discussed in section D. *infra*, the Petitioner's lack of good faith in filing her second bankruptcy case constituted cause for retroactive relief under 11 U.S.C. § 362(d)(1), and would similarly have supported an order granting prospective relief from the automatic stay. Based on the foregoing, the purported split among the Circuits does not exist, making review by this Court unnecessary.

D. The Decisions Below Were Correct

A decision retroactively lifting the automatic stay is reviewed for an abuse of discretion. *Nat'l Envtl, supra*, 129 F.3d at 1054, citing *Kissinger, supra*, 72 F.3d at 108. The decision to grant or deny relief from the automatic stay is committed to the sound discretion of the bankruptcy court. *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 351 (9th Cir.1996), *citing In re Arnold*, 806 F.2d 937, 938 (9th Cir.1986); *In re MacDonald*, 755 F.2d 715, 716 (9th Cir.1985). Decisions committed to the bankruptcy court's

discretion will be reversed only if "based on an erroneous conclusion of law or when the record contains no evidence on which [the bankruptcy court] rationally could have based that decision." *Conejo*, *supra*, 96 F.3d at 351, citing *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1472 (9th Cir.1988).

The debtor's lack of good faith in filing a bankruptcy case constitutes cause for relief from stay. *In re Arnold*, 806 F.2d 937, 939 (9th Cir.1986); *Soares*, *supra*, 107 F.3d at 977. The filing of successive bankruptcy cases without proof of changed circumstances constitutes bad faith. *In re Metz*, 820 F.2d 1495, 1497 (9th Cir.1987). Under Bankruptcy Code section 362(g)(2), the debtor has the burden of proof to demonstrate that "cause" does not exist to annul the stay under section 362(d)(1). *See also United Enters., Ltd. v. ACI Sunbow, LLC (In re ACI Sunbow, LLC)*, 206 B.R. 213, 217 (Bkrtcy.S.D.Cal. 1997).

The underlying facts reveal the Debtor's bad faith and failure to demonstrate changed financial circumstances between the filing of her bankruptcy cases. The Bankruptcy Appellate Panel cited the following findings of the Bankruptcy Court to support the order annulling the stay: the court would have granted relief "in a flash" had Washington Mutual sought it at the time of the foreclosure sale (Petition at p. 9a); the Petitioner filed the second chapter 13 absent changed circumstances, and converted to chapter 7 to avoid the chapter 13 trustee's motion to dismiss with a 180 day bar to re-filing, which indicated bad faith (Petition at 10a); Washington Mutual did not engage in willful conduct, particularly because it attempted to rescind the sale. (*Id.*) Further, the Bankruptcy Appellate Panel noted that the Petitioner cited no evidence that she

filed her second chapter 13 case in good faith, and noted that Petitioner was precluded from offering such evidence based upon the final order annulling the automatic stay obtained by Diversified Properties, from which Petitioner did not appeal. (*Id.*)

The foregoing reveals that the Bankruptcy Court appropriately exercised its discretion to annul the automatic stay retroactive to the date of the filing of the Petitioner's second bankruptcy case. Since no split exists among the Circuits regarding the standards applicable to annulment of the automatic stay, and since the Bankruptcy Court did not abuse its discretion in granting retroactive relief from stay, review of the decision of the Ninth Circuit Court of Appeals is not necessary.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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(admission pending)
Attorneys for Respondents Washington Mutual Bank, N.A. And Cal-Western Reconveyance Corporation

(3)

Supreme Court U.S.
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No. 02-399

In the

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EVELYN R. KRAFT,

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WASHINGTON MUTUAL BANK, N.A.,
CAL-WESTERN RECONVEYANCE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 2002

EVELYN R. KRAFT,
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CAL-WESTERN RECONVEYANCE CORPORATION,
Respondents.

REPLY IN SUPPORT OF EVELYN R. KRAFT'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1. *Kraft's First Question Is Presented*

Contrary to Washington Mutual's contention that Kraft's first question was not presented below (Opposition at 3-6), the opinion of Judge Philip Brandt for the Ninth Circuit BAP upheld the order annulling the stay in favor of Washington Mutual because Kraft failed to prove her eligibility for bankruptcy protection under the good faith filing doctrine. (10a) ("Kraft neither argued nor cited evidence that her second chapter 13 plan was filed in good faith"). Specifically, Judge Brandt held that Kraft's failure to show changed circumstances between the dismissal of her first and the filing of her

second Chapter 13 case and its conversion to one under Chapter 7 constituted bad faith serial filing under the good faith filing doctrine. (9a-12a)

Judge Brandt acknowledged that Kraft was eligible to be a debtor under Section 109, but held that the bankruptcy court was free to impose eligibility requirements not expressed in Section 109. (12a) Judge Brandt explicitly rejected the argument that *Johnson v. Home State Bank*, 501 U.S. 78, 87 (1991) prohibits courts from penalizing debtors for engaging in forms of serial filing not expressly prohibited by Congress. Judge Brandt limited *Johnson* to the particular form of serial filing at issue in that case. (13a). The Ninth Circuit adopted Judge Brandt's opinion as its own. (2a).

Washington Mutual does not dispute that the Second, Sixth and Ninth Circuits impose on the party opposing annulment the burden of proving the debtor's eligibility for bankruptcy protection. *E.g.*, *Casse v. Key Bank N.A. (In re Casse)*, 198 F.3d 327, 332, 334, 339, 342 (2nd Cir. 1999) (affirming annulment in favor of creditor that foreclosed with notice of stay because husband's filing of a Chapter 13 case after dismissal with prejudice of husband and wife's joint Chapter 11 case with prejudice without first obtaining permission from bankruptcy court violated the good faith filing doctrine); *Trident Assoc. Ltd. Partnership v. Metropolitan Life Ins. Co. (In re Trident Assoc. Ltd. Partnership)*, 52 F.3d 127, 129-132 (6th Cir. 1995) (affirming annulment in favor of creditor that foreclosed with notice of stay because filing after debtor's counsel had stated that he did not know whether debtor intended to file for bankruptcy violated good faith filing doctrine), *cert. denied* 516 U.S. 869 (1995); and Kraft's case (9a-10a) (affirming annulment in favor of creditor that foreclosed with notice of stay because filing of second Chapter 13

case in absence of changed circumstances after dismissal of prior case without 180 day bar violated good faith filing doctrine). Judge Brandt has since repeated this view in *Value T Sales, Inc. v. Mitchell (In re Mitchell)*, 279 B.R. 839, 841 (9th Cir. BAP 2002).

Nor does Washington Mutual dispute that the First, Third and Tenth Circuits do not impose on the party opposing annulment the burden of proving the debtor's eligibility for bankruptcy protection. *E.g.*, *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 976 (1st Cir. 1997) ("Treating an action taken in contravention of the automatic stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor."); *Ward. v. Bowest*, 837 F.2d 124, 126 (3rd. Cir. 1988) ("when Charles Ward filed his petition on January 9, 1986, the automatic stay of 11 U.S.C. § 362(a) operated to stay any [enforcement] action"); and *Pro Finance, Inc. v. Spriggs (In re Spriggs)*, 219 B.R. 909, 913 (10th Cir. BAP 1998) (holding that even a serial filer "may rely on the protection afforded under § 362(a)"), *aff'd without published opinion* (10th Cir. 1998).

Washington Mutual does not dispute that the Second, Sixth and Ninth Circuits hold that bankruptcy courts are free to impose eligibility requirements not expressed in Section 109. In *Casse*, 198 F.3d 327, 334, 339; *Trident*, 52 F.3d 127, 130-131; and Kraft's case (12a-13a), the debtor was eligible for bankruptcy protection under Section 109, but found ineligible under the good faith filing doctrine.

Nor does Washington Mutual dispute that the First, Third and Tenth Circuits hold that bankruptcy courts are prohibited from imposing eligibility requirements not expressed in Section 109. *E.g.*, *In re*

Victoria Ltd. Partnership, 187 B.R. 54, 54 (Bankr. D. Mass. 1995) (holding that the good faith filing doctrine is "in conflict with the Bankruptcy Code, its legislative history, Supreme Court precedent, and logic"); *In re Oglesby*, 161 B.R. 917, 924 (Bankr. E.D. Pa. 1993) (citing *Johnson* in holding that "The problem of abusive multiple filings is addressed by 11 U.S.C. § 109(g), and cases not within the precise bounds of that Code section are simply not prohibited."); and *Frieouf v. U.S. (In re Frieouf)*, 938 F.2d 1099, 1103 fn 4 (10th Cir. 1991) ("the bankruptcy court's three-year prohibition against filing a bankruptcy case, which plainly contradicts the 180-day limitation under section 109(g), cannot be sustained under section 105(a)."), *cert. denied* 502 U.S. 1091 (1992).

The Circuits clearly split over whether the party opposing annulment has the burden of proving the debtor's eligibility for bankruptcy protection and over whether bankruptcy courts are free to impose eligibility requirements not expressed in Section 109. These issues were presented in Kraft's case and were dispositive.

2. *The Circuits Split Over Kraft's Second Question*

Washington Mutual asserts that the standard for annulment in all Circuits is one of unlimited discretion. Opposition at 4, 7-8. This is the standard in the Sixth and Ninth Circuits where the courts may look at the "totality of the circumstances." *See* Kraft's case (10a); *National Environmental Waste Corp. v. Riverside (In re National Environmental Waste Corp.)*, 129 F.3d 1052, 1055 (9th Cir. 1997) *cert. denied* 524 U.S. 952(1988); *Mitchell*, 279 B.R. at 841; and *Trident*, 52 F.3d at 131. The First and Tenth Circuits, by contrast, hold

that discretion to annul the stay is very limited. *See Soares*, 107 F.3d at 977 (reversing annulment order because "although courts possess a *limited* discretion to grant retroactive relief from the automatic stay, instances in which the exercise of that discretion is justified are likely to be few and far between") (emphasis added); *Franklin Savings Ass'n v. Office Of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994) ("While district courts and bankruptcy courts have the authority to 'annul' a stay, ... such a result is rare and probably available only to claimants who were honestly ignorant of the bankruptcy stay.").

Washington Mutual asserts that no Circuit requires proof by the creditor of "inability to comply." Opposition at 8. Washington Mutual, however, does not dispute that the First and Tenth Circuit each have denied annulment based on the creditor's ability to comply with the stay. *Soares*, 107 F.3d at 978 (reversing annulment in favor of creditor that had prior notice of the stay); *Franklin Savings Ass'n*, 31 F 3d at 1023 (affirming denial of annulment to creditor that had prior notice of the stay) and *Spriggs*, 219 B.R. 909, 913 (10th Cir. BAP 1998) (refusing annulment to creditor without notice of the stay, because, based on debtor's history of serial filing, creditor should have suspected that debtor had filed another petition prior to scheduled foreclosure sale).

Washington Mutual attempts to distinguish *Soares* by asserting that "*Soares* explicitly allows annulment of the automatic stay [based] solely upon a showing of the debtor's bad faith, and regardless of notice of the stay." Opposition at 8. In fact, the "bad faith" of the debtor referred to *in dicta* in *Soares* meant "bad faith" in giving notice of the bankruptcy and did not refer to "bad faith" in filing the case. Explaining the

role of "bad faith" of the debtor, *Soares* cites *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911 (6th Cir. 1993); *Calder v. Job (In re Calder)*, 907 F.2d 953, 956 (10th Cir. 1990); and *Albany Partners, Ltd v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675-676 (11th Cir. 1984). In *Easley*, the Sixth Circuit formulated the following standard: "only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the debtor." *Easley*, 990 F.2d at 911. *Easley* applied this standard to reverse annulment because the debtor "did nothing to lull plaintiffs into believing it would not rely on the stay." *Id.* at 912. *Calder* and *Albany* each affirmed annulment because the debtor, in pursuit of an improper ulterior motive, had withheld notice of the bankruptcy affecting the property in question. *Calder*, 907 F.2d at 956 (Calder caused the creditor's inability to comply with the stay in that "Calder actively litigated the state court action and did not provide notice of the pending Chapter 13 proceeding until just before the state court was to enter a final judgment" against Calder); and *Albany Partners, Ltd.*, 749 F.2d at 675-676 (debtor caused the creditor's inability to comply with the stay by failing to inform the creditor that it claimed an interest in the property scheduled for foreclosure, despite a court order holding that the property belonged to another party). Thus, in the First and Tenth Circuits, a showing by the offending creditor of "inability to comply" is necessary but not sufficient to obtain annulment. At a minimum, the creditor must also show that a calculated bad faith act by the debtor caused the creditor's inability to comply. *Soares*, 107 F.3d at 977; *Spriggs*, 219 B.R. at 913.

In apparent contradiction with its assertion that all Circuits apply a standard of "unlimited discretion," Washington Mutual asserts that all Circuits require a showing of "extreme circumstances" and that there was such a showing in Kraft's case. Opposition at 8-9. In fact, Judge Brandt acknowledged that there were no "extreme circumstances" in Kraft's case, but held that "extreme circumstances " was merely a factor and not a "strict requirement." (10a)

Again contradicting its assertion that all Circuits apply a standard of "unlimited discretion," Washington Mutual asserts that all Circuits require a showing of "entitlement to prospective relief authorizing the enforcement action taken" and that there was such a showing in Kraft's case. Opposition at 9. In fact, Judge Brandt held that such entitlement was only a factor and not a "strict requirement." (10a) Judge Brandt's holding was necessary to the ruling in Kraft's case because Washington Mutual could not have met the standard for prospective relief authorizing the enforcement action taken. An order granting immediate prospective relief without notice requires a showing of "imminent irreparable harm." *See* Section 362(f) and Bankr. Rule 4001. Congress recognized that due process requires *pre*-deprivation notice in all but "extreme circumstances," *e.g.*, *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993), and enacted this requirement directly into Section 362(f) and Bankr. Rule 4001.

The Circuits clearly split over whether the creditor moving for annulment has any burden and, in particular, whether the creditor has the burden of proving one or more of "inability to comply," "extreme circumstances," and entitlement to hypothetical

"prospective relief authorizing the enforcement action taken." These issues were dispositive in Kraft's case.

3. *Krafts Third Question Is Presented*

Contrary to Washington Mutual's contention that Kraft's third question was not presented below (Opposition at 7), Judge Brandt expressly held that the order under Section 549(c) annulling the stay to the date of sale in favor of purchaser Diversified required entry of an order annulling the stay to the date of filing in favor of seller Washington Mutual under Section 362(d). (10a-11a, 14a).

In particular, as to Section 362(d)(1), Judge Brandt held that, by annulling the stay to the date of the September 2, 1998 foreclosure sale, the order in favor of purchaser Diversified under Section 549(c) established that Kraft had filed her second Chapter 13 case in bad faith on April 15, 1998 and required annulment for cause under Section 362(d)(1), namely, bad faith serial filing, in favor of seller Washington Mutual. (10a). As to Section 362(d)(2), Judge Brandt held that the order in favor of purchaser Diversified under Section 549(c) resulted in Kraft and the estate losing all of the $36,634.55 to $70,000.00 of equity in the property and thus required annulment in favor of seller Washington Mutual under Section 362(d)(2) for lack of equity. (10a-11a). As to laches, Judge Brandt held that, in light of the annulment in favor of purchaser Diversified, seller Washington Mutual could rely on the bankruptcy court granting annulment in Washington Mutual's favor at any time and thus laches did not arise from Washington Mutual's failure to move for annulment for two years after the apparent violation and for one year after Kraft had commenced her action for damages under Section

362(h) based on the apparent violation of the stay. (14a).

Kraft's third question concerning whether an order under Section 549(c) upholding a post-petition foreclosure sale requires annulment in favor of the secured creditor seller of the property was presented in Kraft's case and, indeed, was dispositive.

The Circuits split regarding whether entry of an order under Section 549(c) in favor of the purchaser requires annulment in favor of the seller. The Ninth Circuit, espousing a transactional view, holds that, since transactions in violation of the stay are void under *Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940), a rule such as Section 549(c), which declares a particular transaction valid as to one party to the transaction, necessarily absolves all participants in the transaction from liability for violating the stay. The Third Circuit in *Ward*, 837 F.2d at 126, views the avoiding power of the trustee provided for in Section 549(a) as a remedy and Section 549(c) as an exception to that remedy. Under the Third Circuit's view, other remedies such as Section 362(h) are not affected by the loss of the avoiding power vis-à-vis a bona fide purchaser. *See Administrator of Veterans Affairs v. Bernard (In re Bernard)*, 21 B.R. 287, 288 and n. 11 (Bankr. E.D. Pa 1982). In *Mitchell*, the Ninth Circuit BAP discussed the two approaches and explicitly rejected the Third Circuit's approach. 279 B.R. at 844 ("We decline to follow *Ward*.").

CONCLUSION

For these reasons, Kraft respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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